Filed 8/20/10 Certified for partial publication 9/8/10 (order attached)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re V.V. et al., Persons Coming Under the Juvenile Court Law.	
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. V.G. et al., Defendants and Appellants.	C063602 (Super. Ct. Nos. JD226962, JD228026)

Appellants V.G. (mother) and J.V. (father) appeal from the juvenile court's orders terminating their parental rights as to the two children, V.V. (born January 2005) and Va.V. (born August 2008). (Welf. & Inst. Code, §§ 395, 366.26.)[1] The mother contends she was not notified of the section 388 hearing where her reunification services were terminated, and the juvenile court should have applied the parent-child and sibling bond

[1] Hereafter, undesignated statutory references are to the Welfare and Institutions Code.

exceptions to adoption. The father contends the juvenile court erred by preventing him from discharging retained counsel. We shall affirm the juvenile court's orders.

FACTS AND PROCEDURE

In February 2008, the Sacramento County Department of Health and Human Services (DHHS) filed a nondetained dependency petition pursuant to section 300, subdivision (b), alleging violence, the mother's history of substance abuse, and positive tests for marijuana and methamphetamine in October 2007.

According to a March 2008 report, the mother had moved in with L.H. and C.H., whom she considered her parents. The mother initially denied using drugs, but later admitted using marijuana and methamphetamine. She used methamphetamine together with the father; the mother believed V.V. would not be safe with him because the father gets a lot of traffic day and night from selling drugs. Regarding domestic violence, the mother stated, "He's [the father] kicked me, threw a Gatorade bottle at my head, put his arms around my throat, and bit me. He's done those things around [V.V.]."

The father denied the drug and domestic violence allegations. He refused to test for drugs, or sign the family maintenance plan.

The mother tested positive for methamphetamine in February 2008. She admitted using methamphetamine since she was 16 or 17 years old, and smoking the drug three to four times a week.

The original petition was superseded by an amended petition (§ 300) filed in March 2008, which added domestic violence allegations.

An April 2008 report related the mother was compliant with her drug testing and treatment program. The father had been charged with six felony drug offenses after he was found possession of methamphetamine, cocaine, heroin, and a digital scale. He refused to sign a release for an alcohol and drug assessment; the father first wanted to talk to his criminal attorney because he did not want to incriminate himself.

In April 2008, the father waived services, and the mother waived her rights and submitted on the petition. The juvenile court sustained the petition, ordered services for the mother, and continued placement with her. DHHS later amended the petition to include the father's arrest on felony drug charges.

In July 2008, DHHS filed a supplemental petition (§ 387) alleging the mother used methamphetamine in V.V.'s presence and tested positive for methamphetamine in July 2008, when she was eight months pregnant. V.V. was placed with C.H. and L.H.

V.V. was not adjusting well to her placement, and frequently cried for her mother. C.H. and L.H. were unwilling to provide long-term care for her.

The mother gave birth to Va.V. in August 2008, and both tested negative for drugs at delivery. The baby was put into protective custody the following day, and DHHS filed a dependency petition for the minor pursuant to section 300,

subdivisions (b) and (j). The children were placed together in a confidential foster home.

The March 2009 permanency report stated the children were doing well in their current foster placement. The father still refused to participate in services because he believed it would be an admission of criminal activity. The mother tested positive for methamphetamine in September and October 2008. In February 2009, she tested positive for methamphetamine and was discharged from treatment. The mother tested presumptive positive for marijuana two times in March 2009.

The juvenile court terminated services for the father in April 2009. DHHS filed a petition for modification (§ 388) in May 2009, seeking termination of the mother's services. The juvenile court granted the petition in June 2009, and set a termination hearing (§ 366.26).

A social worker found the parents' visits with the children were consistent and regular. Va.V. was not fazed by the visits and showed little excitement when they began or distress when they ended.

V.V. looked forward to visits, and considered the mother and father to be her parents. On a visit in October 2009, V.V. was told she would not be going home because she would be going to a new house with grownup parents. She was quiet during the visit, apparently taking in the information. She was tearful on the ride home, and told the foster parent she "was not going home to her mommy and daddy, because they were not grownup."

The children have an eight-year-old half brother, J.V., who is the father's son. V.V. was happy that her prospective adoptive family had a boy close to her brother's age. She regularly visited J.V., and was excited to go fishing with her new big brother in the prospective adoptive family.

V.V. was interested in finding out about the prospective adoptive family. She was particularly excited that they had a large house, she could go to preschool, the family liked Disney, and they would take her fishing. If she could have a princess bed and an Ariel doll, V.V. would move to the new family right away.

Following a contested hearing, the juvenile court terminated rights with a permanent plan of adoption.

DISCUSSION

I.

The Mother Was Given Adequate Notice

The mother contends she was not notified of the section 388 hearing at which the juvenile court terminated her reunification services and set a section 366.26 hearing.[2]

A

Section 388, subdivision (a) permits a parent or other person having an interest in the dependent child to petition for

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[2] Section 366.26, subdivision (l)(1) does not preclude the mother from raising this claim on appeal because the juvenile court never advised her she had to seek writ review of the hearing setting a section 366.26 hearing. (*In re Rashad B.* (1999) 76 Cal.App.4th 442, 448 (*Rashad B*).)

a hearing to modify or set aside any order of the court upon a change of circumstance or new evidence. Subdivision (d) of section 388 states in relevant part: "If it appears that the best interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held and shall give prior notice, or cause prior notice to be given, to the persons and by the means prescribed by Section 386, and, in those instances in which the means of giving notice is not prescribed by those sections, then by means the court prescribes."

Notice is required by due process: "Since the interest of a parent in the companionship, care, custody, and management of his children is a compelling one, ranked among the most basic of civil rights [citations], the state, before depriving a parent of this interest, must afford him adequate notice and an opportunity to be heard. [Citations.]" (*In re B.G.* (1974) 11 Cal.3d 679, 688-689.)

B

On May 29, 2009, the juvenile court sent the mother notice of the hearing on the section 388 petition to an address on Moorhouse Court. This was the address of L.H. and C.H., whom she considered to be her parents, and with whom the minor V.V. was originally placed. This was also the mailing address she had designated with the juvenile court.[3]

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[3] The mother designated a new mailing address in September 2009, after the section 388 hearing.

Along with the petition for modification, DHHS filed a form showing the mother's address was on East Southgate Drive. The mother argues the juvenile court did not notify her because it did not send notice to the East Southgate Drive address.

The mother was not present at the hearing on the section 388 petition. Counsel for the father asked the juvenile court whether there was proof of service. The court said notice was sent to the parents.

Section 316.1, subdivision (a) provides: "Upon his or her appearance before the court, each parent or guardian shall designate for the court his or her permanent mailing address. The court shall advise each parent or guardian that the designated mailing address will be used by the court and the social services agency for notice purposes unless and until the parent or guardian notifies the court or the social services agency of a new mailing address in writing."

The mother did not designate a different mailing address before the section 388 hearing. She lived at several different addresses during the dependency; at various points DHHS designated addresses for the mother at Cleveland Avenue in Sacramento, at Grand Avenue in Sacramento, at East Southgate Drive in Sacramento, the Rescue Court address, and at Schooner Way in Citrus Heights. Up until the section 388 hearing, mother never notified the court that her mailing address changed, thus the juvenile court continued to notify the mother at the Moorhouse Court address. Neither the mother nor her counsel

expressed any problem with notice to this address until after the section 388 hearing took place.

The juvenile court was not required to notify the mother at her current residential address. "A permanent mailing address, designated for purposes of receiving notices, need not be the address at which a parent is actually residing." (*Rashad B., supra*, 76 Cal.App.4th at p. 450.) It is the parent's duty to inform the juvenile court of any change in her mailing address. (*Ibid.*) While DHHS indicated the mother had a new residential address, the mother had not notified the juvenile court of any change in her mailing address.

The mother relies on California Rules of Court, rule 5.570(a)(5), which provides the petition for modification must include "[t]he name and residence address of the parent . . . ." This provision addresses the notice given by the *party* filing the section 388 petition for modification, in this case DHHS (California Rule of Court, rule 5.570(a) ["The petition must be verified, and to the extent known to the petitioner, must contain the following: [¶] . . . [¶]"]). It has no bearing on the juvenile court's duty to notify. The juvenile court did not err by mailing notice to the mother's designated mailing address.

II.

There Are No Exceptions to Adoption

The mother contends the juvenile court erred by failing to find either the beneficial parent-child or sibling relationship exceptions to adoption. We disagree.

At a hearing under section 366.26, if the court finds by clear and convincing evidence that a minor is likely to be adopted, the court must terminate parental rights and order the minor placed for adoption unless "[t]he court finds a compelling reason for determining that termination would be detrimental" due to one of the statutorily enumerated exceptions. (§ 366.26, subd. (c)(1)(B).)

The parent has the burden of establishing an exception to termination of parental rights. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.) "Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)

The juvenile court's ruling declining to find an exception to adoption must be affirmed if it is supported by substantial evidence. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576; *In re Zachary G., supra,* 77 Cal.App.4th at p. 809; *In re Derek W.* (1999) 73 Cal.App.4th 823, 827; cf. *In re Jasmine D., supra,* 78 Cal.App.4th at p. 1342 [applying abuse of discretion standard].) "On review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order. [Citations.]" (*In re Autumn H., supra*, 27 Cal.App.4th at p. 576.)

A

The mother claims the juvenile court erred by failing to find an exception to adoption based on the mother's beneficial relationship with the children. Section 366.26, subdivision (c)(1)(B)(i), provides an exception to adoption when "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

However, a parent may not claim this exception "simply by demonstrating some benefit to the child from a continued relationship with the parent, or some detriment from termination of parental rights." (*In re Jasmine D., supra*, 78 Cal.App.4th at p. 1349.) The benefit to the child must promote "the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H., supra,* 27 Cal.App.4th at p. 575.)

In support of her argument, the mother notes V.V. lived with her for the first three and one-half years of her life, the mother visited her regularly, and V.V. referred to her parents

as "[m]ommy" and "[d]addy." She also cites testimony showing V.V. did not want to leave the visits, at times crying and hiding under the table when they ended.

The record establishes V.V. was bonded to her parents; she cried at the end of some visits, enjoyed the visits with her parents, and was teary-eyed when told she would not be returning to them. However, V.V. was excited at the prospect of meeting the prospective adoptive parents, and expressed her desire to live with them. Her reaction to the news that she would be getting new parents is also relevant. V.V.'s response--that she "was not going home to her mommy and daddy, because they were not grownup" shows this child will not be so harmed by severing the parental bond as to justify an exception to the statutory preference to adoption. Since Va.V. was detained shortly after her birth and considered her foster parents to be her parents, the exception does not apply to either minor.

B

The mother urges application of the exception to adoption that applies when termination of parental rights will result in a "substantial interference with a child's sibling relationship . . . ." (§ 366.26, subd. (c)(1)(B)(v).) In evaluating whether this exception applies, the court "tak[es] into consideration the nature and extent of the [sibling] relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in

the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption." (§ 366.26, subd. (c)(1)(B)(v).)

"[E]ven if adoption would interfere with a strong sibling relationship, the court must nevertheless weigh the benefit to the child of continuing the sibling relationship against the benefit the child would receive by gaining a permanent home through adoption. [Citation.]" (*In re Celine R.* (2003) 31 Cal.4th 45, 61.)

There is scant evidence of the children's relationship with their half brother. The boy is the father's child; while V.V. visits him, there is no record of their having lived together. V.V. was able to visit him while she was in foster care, and there is no indication terminating parental rights will diminish this bond. Lacking evidence of a substantial bond or that termination of parental rights would substantially interfere with whatever bond existed, it was not an abuse of discretion for the juvenile court to terminate parental rights.

III.

There Was No Violation of the Father's Right to Discharge Retained Counsel

The father's sole contention on appeal is that the juvenile court erred in denying his request to discharge retained counsel.

A

The father was represented in the dependency action by Evelyn Cox as retained counsel. On November 6, 2009, the first

day of the contested section 366.26 hearing, Cox informed the court that the father had concerns about her continuing as his counsel; the father had executed a substitution of attorney form and was interested in hiring Paul Phillips as his new counsel. The juvenile court indicated there were two issues--a potential *Marsden*[4] motion, and a "substitution of attorney." The court asked Cox if she wanted to deal with both or just one of the issues. Cox wanted to address both, as the father had raised "a pretty serious issue" with her which she would like placed on the record.

The juvenile court held a *Marsden* hearing, and concluded there was not an irreparable breakdown in the attorney-client relationship. It addressed some of the father's concerns about placement, and denied the *Marsden* motion.

Following the *Marsden* hearing, the juvenile court asked Phillips whether he was ready to represent the father. Phillips estimated a three-week continuance would be adequate. He had 20 years' civil and criminal trial work, but no experience in dependency cases.

Counsel for the mother informed the juvenile court the mother would not make the hearing due to her apparent illness, and joined the father's request for a continuance. The juvenile court indicated it would grant no longer than a 10-day

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[4] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

continuance; it declined to relieve Cox until Phillips was prepared to go forward.

The juvenile court proposed a continuance to November 24 or 25. Upon learning the social worker would be unavailable on those dates, the juvenile court continued the hearing to November 10, 2009. Phillips attended the November 10 hearing "as an observer to learn[.]" Cox represented the father for the remainder of the dependency proceedings.

B

The father claimed the juvenile court erred in applying *Marsden* to retained counsel, and its refusal to grant a continuance was an abuse of discretion.

In a criminal case, when a defendant requests substitute appointed counsel, the trial court must permit the defendant to explain the specific reasons why the defendant believes current appointed counsel is not adequately representing him. (*Marsden, supra,* 2 Cal.3d at pp. 123-124.) Juvenile courts, relying on the *Marsden* model, have permitted the parents, who have a statutory and a due process right to competent counsel, to air their complaints about appointed counsel and request new counsel be appointed. (§ 317.5; *In re James S.* (1991) 227 Cal.App.3d 930, 935, fn. 13.)

The father correctly notes that the *Marsden* procedure did not apply to his attempt to discharge Cox because she was retained counsel. The procedure specified by *Marsden* for discharging appointed counsel and appointing new counsel for an indigent defendant is inapplicable to retained counsel. (*People*

v. Ortiz (1990) 51 Cal.3d 975, 986.) This is so because "[t]he right of a nonindigent criminal defendant to discharge his retained attorney, with or without cause, has long been recognized in this state [citations]." (*Id.* at p. 983.)

We see no reason to fashion a different rule for dependency cases. The *Marsden* procedure applies to a parent's request to discharge only appointed counsel, and it was error for the juvenile court to hold a *Marsden* hearing. However, the error was harmless beyond a reasonable doubt because the juvenile court separately addressed the father's request to discharge retained counsel and substitute another retained counsel of his choosing.

The juvenile court was not, as the father contends, unwilling to allow him to discharge Cox and retain Phillips as substitute counsel. The court would have allowed the father to proceed with Phillips if Phillips was ready to go forward. Phillips was not ready, and the juvenile court refused to continue the case to give him time to prepare. The appropriate question to ask is whether the juvenile court erred in refusing to grant the continuance.

In criminal cases, "[a] nonindigent defendant's right to discharge his retained counsel, however, is not absolute. The trial court, in its discretion, may deny such a motion if discharge will result in 'significant prejudice' to the defendant [citation], or if it is not timely, i.e., if it will result in 'disruption of the orderly processes of justice' [citations]." (*People v. Ortiz, supra,* 51 Cal.3d at p. 983.)

This does not reflect the balance of interests in dependency cases. The focus of dependency law is "on the preservation of the family as well as the safety, protection, and physical and emotional well-being of the child." (§ 300.2.) The children's interests are of paramount consideration once reunification services have been terminated. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) Accordingly, "[t]he rights and protections afforded parents in a dependency proceeding are not the same as those afforded to the accused in a criminal proceeding." (*In re James F.* (2008) 42 Cal.4th 901, 915.)

Pursuant to section 352, the juvenile court may for good cause order a continuance of a dependency hearing. "'Section 352 mandates that before the court can grant a continuance it must "give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements."'" (*In re Elizabeth R.* (1995) 35 Cal.App.4th 1774, 1798.)

The juvenile court has broad discretion in determining whether to grant a continuance. (§ 352, subd. (a); *In re Gerald J.* (1991) 1 Cal.App.4th 1180, 1186-1187.) As a reviewing court, we can reverse an order denying a continuance "only upon a showing of an abuse of discretion." (*In re Gerald J., supra*, at p. 1187.)

The continuance was requested on the day of the section 366.26 hearing. Although the hearing was continued due to the mother's apparent illness, Phillips requested a longer

continuance so he could prepare to represent the father. Phillips had no experience in dependency law. His estimate of three weeks to prepare for a trial on termination of his client's parental rights was optimistic, to say the least.

Dependency is a specialized practice. It is not a field where expertise can be acquired on a moment's notice, or even in three weeks. The Legislature has mandated that the courts establish procedures for ensuring all parties in a dependency action are represented by competent counsel. (§ 317.6.) The juvenile court should not have taken Phillips at his word that he would need only three weeks to be able to try the father's termination hearing.

It was not an abuse of discretion to deny a continuance which would have substantially delayed the termination hearing.

DISPOSITION

The orders of the juvenile court are affirmed.

CANTIL-SAKAUYE, J.

We concur:

NICHOLSON, Acting P. J.

ROBIE, J.

Filed 9/8/10

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re V.V. et al., Persons Coming Under the Juvenile Court Law.	
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. V.G. et al., Defendants and Appellants.	C063602 (Super. Ct. Nos. JD226962, JD228026) ORDER CERTIFYING OPINION FOR PARTIAL PUBLICATION

APPEAL from a judgment of the Superior Court of Sacramento County, Dean L. Petersen, Juvenile Court Referee. Affirmed.

Carolyn S. Hurley, under appointment by the Court of Appeal, for Defendant and Appellant V.G.

Elaine Forrester, under appointment by the Court of Appeal, for Defendant and Appellant J.V.

Office of the County Counsel, Robert A. Ryan, Jr., County Counsel, Lilly C. Frawley, Deputy County Counsel, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts I and II of the Discussion.

THE COURT:

The opinion in the above-entitled matter filed on August 20, 2010, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports and it is so ordered.

BY THE COURT:

NICHOLSON, Acting P. J.

ROBIE, J.

CANTIL-SAKAUYE, J.